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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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JANE ROE,

Petitioner,

v.

TELETECH CUSTOMER CARE  
MANAGEMENT (COLORADO) LLC,

Respondent.

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PETITIONER JANE ROE'S RESPONSE TO  
AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENT

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## I. INTRODUCTION

Amicus Curiae Pacific Legal Foundation (“PLF”) admits that “[t]he facts of this case – particularly Roe’s job that involves mostly talking on the telephone – invite a court to look for narrow grounds to uphold her complaint.” Amicus Curiae Brief of Pacific Legal Foundation at 2-3. Ms. Roe agrees. The Court need go no further than holding that Washington’s Medical Use of Marijuana Act (“MUMA”) prohibits private employers with no federal contracts from barring from the workplace an employee in a non-safety-sensitive position who uses medical marijuana at home in accordance with Washington law.

When Washington voters approved I-692 they understood that, when it comes to regulating marijuana usage, individual facts and circumstances matter. First, Washington voters deliberately distinguished between recreational and medical use of marijuana. Second, they implicitly required employers to accommodate lawful use of medical marijuana outside the workplace. This accommodation mandate prohibits an employer from enforcing a blanket drug policy without regard to: (1) whether an employee uses medical marijuana in accordance with state law; (2) whether she holds a safety-sensitive position; or (3) whether her use of medical marijuana impairs her ability to do her job.

Having admitted that the facts of Ms. Roe's case invite the Court to uphold her claim, PLF fills its brief with hypothetical facts and doomsday scenarios that are far removed from this case. The Court should not be diverted by this alarmist rhetoric.

## II. ARGUMENT

### A. **TeleTech is a Private Employer with No Federal Contracts or Legal Duty to Maintain a Drug-Free Workplace.**

PLF argues that the Court should rule in favor of TeleTech because “[c]ompanies that contract with the federal government have special concerns with regard to maintaining a drug-free workplace.” Amicus Br. at 4. This argument is a non sequitur. TeleTech is a private employer and has no federal contracts requiring it to maintain a drug-free workplace. *Cf. id.* at 4-5. TeleTech is not a recipient of federal aid. *Cf. id.* Nor does it face *any* civil or criminal penalties for employing qualifying patients who use medical marijuana in accordance with MUMA. *Cf. id.*

Ms. Roe has repeatedly recognized that recipients of federal contracts or funding are required by federal law to maintain an absolutely drug-free workplace. In such a situation, under the federal Constitution's Supremacy Clause, federal law would trump MUMA's duty of accommodation. However, those circumstances are not present here.

**B. PLF Fails to Distinguish Between the Effects of Illicit Drug Abuse and Authorized Medical Use of Marijuana.**

PLF presents the Court with a parade of horrors associated with employee drug abuse ranging from “employee absenteeism, shiftlessness, and malfeasance,” to increased health care costs, industrial accidents, and disciplinary problems. *See* Amicus Br. at 6-11. Washington employers have a legitimate interest in preventing drug abuse among employees. Under MUMA, employers remain free to discipline or terminate medical marijuana patients who are absent, shiftless, or engage in malfeasance.

PLF cites a series of medical and social science studies that document potential adverse health consequences and employment problems associated with abuse of marijuana and other drugs. However, PLF has presented no evidence whatsoever that these potential problems occur with individuals who use marijuana as a medical treatment under a physician’s supervision and in compliance with state law.

Indeed, the very American Medical Association study that PLF relies on to demonstrate the biological effects and potentially harmful consequences of marijuana use expressly states: (1) “[m]ost research on the harmful consequences of marijuana use has been conducted in simulated laboratory environments and in individuals who use cannabis *for nonmedical purposes*,” and (2) “it is not clear to what extent the

adverse effects reported in recreational users are applicable to those who use medical marijuana.” American Medical Association Council on Scientific Affairs (A-01), Featured Report: Medical Marijuana (emphasis supplied).<sup>1</sup> Similarly, the Department of Health and Human Services study cited by PLF examined only illicit drug use by employees and its effect on the workplace. The authors of the study defined “illicit drugs” to mean drugs, including marijuana, that are “used nonmedically.” Sharon L. Larson, et al., Dep’t of Health & Human Servs., *Worker Substance Use and Workplace Policies and Programs* 96 (2007).<sup>2</sup> By its very terms, then, this study and its findings do not apply to medical use of marijuana.

In fact, none of the studies cited by PLF establish that the lawful, medical use of marijuana present the same potential health concerns or workplace problems as abuse of illicit drugs. Neither PLF nor TeleTech has presented one shred of evidence that using medical marijuana under a physician’s supervision leads to increased rates of absenteeism, use of sick days, health problems, employee turnover, or other barriers to workplace productivity. There is no evidence that TeleTech suffered from any of these detriments. To the contrary, using medical marijuana under her doctor’s supervision is precisely what enabled Ms. Roe to be healthy,

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<sup>1</sup> Available at <http://www.ama-assn.org/ama/no-index/about-ama/13625.shtml> (last visited July 23, 2010).

<sup>2</sup> Available at <http://oas.samhsa.gov/work2k7/work.pdf> (last visited July 23, 2010).

productive, and employed. The only barrier to her sustained employment at TeleTech was the Company's decision to terminate her in violation of MUMA and Washington public policy.

**C. Ms. Roe Did Not Hold a Safety-Sensitive Position or Pose Any Risk to TeleTech or its Customers.**

Ms. Roe agrees with PLF that qualifying patients who hold safety-sensitive positions should be required to pass drug tests. Nothing in MUMA shields firefighters, truck drivers, heavy equipment operators, or other individuals with safety-sensitive jobs from being terminated for a positive drug test. *Cf.* Amicus Br. at 15-16. However, Ms. Roe did not hold any of those jobs. She was a Customer Service Consultant for TeleTech who was responsible for responding to incoming customer phone calls and e-mails. Ms. Roe's at-home, medical use of marijuana did not impair her functioning or her ability to perform her job in any way. She never posed a safety or liability risk to TeleTech or anyone else.

In an attempt to advance TeleTech's position, PLF cites a series of cases in which employers were held vicariously liable for employees who killed, raped, or maimed other individuals in drug- or alcohol-fueled rages or accidents. *See* Amicus Br. at 16-17. The Court should not be diverted by these extreme examples, which are far removed from this case. Ms.

Roe's at-home use of medical marijuana in compliance with MUMA poses no threat to TeleTech, her co-workers, customers, or anyone else.

Second, nothing in MUMA prevents employers from being able to "cull out job applicants whose alcohol or drug use raises the likelihood of threats to the safety of the workplace, other employees, or third parties." Amicus Br. at 18. MUMA does not prohibit employers from creating and enforcing workplace anti-drug policies. It simply prohibits employers from imposing blanket policies barring from the workplace qualifying patients who use medical marijuana at home in accordance with MUMA without regard to whether such usage interferes with their job performance or otherwise creates a risk in the workplace.

Furthermore, MUMA does not prevent an employer from disciplining or discharging a qualifying patient who *abuses* medical marijuana. Just as employers must accommodate their employees' lawful use of prescription drugs, they must accommodate lawful use of medical marijuana. But employers need not accommodate abuse of either.

**D. MUMA's Plain Language Requires Employers to Accommodate Off-Site Use of Medical Marijuana.**

MUMA limits an employer's duty of accommodation to off-site use of medical marijuana. As originally enacted, RCW 69.51A.060(4) states: "[N]othing in this chapter requires any accommodation of any

medical use of marijuana *in any place of employment . . .*” (Emphasis supplied). The converse of this limitation is that employers do have a duty to accommodate off-site use of medical marijuana. PLF dismisses Ms. Roe’s plain reading of RCW 69.51A.060(4) as a logical fallacy. Amicus Br. at 12-13. But it is PLF’s critique that is illogical. Judge Aldisert’s sample fallacy, cited by PLF, bears no relation to Ms. Roe’s argument because driving under the influence is not the converse of larceny. In fact, there is no relationship at all between the two acts. *See id.*

A far better analogy to RCW 69.51A.060(4) is a park sign stating: “No swimming in the lake after dark.” The converse of that statement is that swimming in the lake *is* permitted before dark, which is exactly how park visitors would interpret the sign. If swimming was not permitted in the lake at any time, one would expect the sign to read simply: “No swimming in the lake.”

Similarly, here, the converse of RCW 69.51A.060(4)’s statement that employers are not required to accommodate employees’ on-site use of medical marijuana is that employers *are* required to accommodate off-site use. If RCW 69.51A.060(4) was intended to relieve employers of *any* duty to accommodate employees who use medical marijuana it would read simply: “An employer has no duty to accommodate the medical use of marijuana.”

Ms. Roe and PLF do agree on one point of statutory interpretation. The 2007 amendments to MUMA, which inserted the word “on-site” into RCW 69.51A.060(4), were intended solely to clarify the existing law and “does not work any material change in employer responsibilities.” See Amicus Br. at 11.

PLF’s reliance on *Freightliner, LLC v. Teamsters Local 305*, 336 F. Supp. 2d 1118 (D. Or. 2004), is misplaced. *Freightliner* involved the interpretation and enforcement of a collective bargaining agreement providing that any employee with a positive drug test result would be subject to discharge. *Id.* at 1121. Collective bargaining cases present entirely different legal questions and standards than the ones at issue here. In *Freightliner*, the employee, through his union, entered into a voluntary contract agreeing that he would be subject to discharge if he failed a drug test. To find for the Union, the court would have had to rule not only that Oregon’s Medical Marijuana Act required employers to accommodate medical marijuana use, but also that that duty affirmatively invalidated an otherwise enforceable collective bargaining agreement. It is well-established that a valid collective bargaining agreement may trump an employer’s duty to accommodate. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002). Ms. Roe does not face that heightened burden here. TeleTech’s drug policy is not the product of

collective bargaining and she is not asking this Court to invalidate a contract provision she or her representative negotiated with the Company. In addition, *Freightliner's* cursory analysis of Oregon's Medical Marijuana Act is erroneous and should not be followed by this Court.

Next, PLF argues that the potential long-term biomedical effects of prolonged marijuana usage "do not allow for [a] separation between on-duty and off-duty use." Amicus Br. at 14. This argument fails for two reasons. First, PLF's medical and policy arguments conflict with the judgment of Washington voters and legislators as reflected by the plain language of the statute. RCW 69.51A.010(3) defines "medical use of marijuana" to mean "the production, possession, or administration of marijuana . . . ." An employee who does not "possess", "produce" or "administer" marijuana in the workplace does not "use" medical marijuana "in a place of employment."

Second, MUMA requires that employers conduct individualized assessments into whether a qualified patient's use of medical marijuana *actually* impairs her job performance. If it does, the employer has no duty to hire or retain that individual. If it does not, the individual is entitled to accommodation under RCW 69.51A.060(4). However, employers may not act on generalized assumptions about how marijuana use may affect an employee's memory, judgment, or job performance. In this case, Ms.

Roe's at-home, medical use of marijuana never impaired her ability to perform her job at TeleTech in any way.

### CONCLUSION

Under MUMA, employment decisions involving qualifying patients who test positive for drugs must be made on an individualized basis. Similarly, this Court must decide this case based on the facts before it. Ms. Roe worked at TeleTech in a customer service call center. TeleTech is a private company with no federal contracts or legal requirements to maintain a drug-free workplace. Ms. Roe did not hold a safety-sensitive position. Her at-home use of medical marijuana to treat debilitating migraine headaches did not pose any risk to TeleTech, her co-workers, or customers. Nor did it interfere with her ability to do her job in any way. Different facts and circumstances would lead to a different outcome. But under the circumstances presented here, TeleTech's decision to terminate Ms. Roe solely for failing a drug test violated MUMA and Washington public policy.

Respectfully submitted this 23rd day of July, 2010.

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